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Constitutional Law—Flag Misuse and the First Amendment—Spence v. Washington, 94 S. Ct. 2727 (1974)

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CONSTITUTIONAL LAW—FLAG MISUSE AND THE FIRST AMENDMENT—*Spence v. Washington*, 94 S. Ct. 2727 (1974).

Defendant Spence displayed an inverted American flag from his apartment window during the days following the Cambodian incursion and Kent State tragedy in 1970.[1] Affixed to the flag was a peace symbol, formed with black tape. The Washington Supreme Court sustained a conviction for violation of Washington State's "improper use"[2] statute.[3] On appeal to the Supreme Court, reversed. *Held:* The statute, as applied to defendant's conduct, impermissibly infringed expression protected by the first amendment. *Spence v. Washington*, 94 S. Ct. 2727 (1974).[4]

Because *Spence* decided only that the statute involved could not constitutionally be applied to the specific conduct in question, no explicit definition of the scope of governmental power[5] to punish unorthodox flag use emerged from the decision. Nevertheless, as this note

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1. American military invasion of certain areas of Cambodia bordering South Vietnam in late April of 1970, coupled with the killing of four Kent State University students by National Guardsmen during a demonstration shortly thereafter, prompted unprecedented protest demonstrations and political activity on many of the nation's college campuses. *See* N.Y. Times, May 7, 1970, at 1, cols. 4–8.

2. WASH. REV. CODE § 9.86.020 (1963):

> No person shall, in any manner, for exhibition or display: (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . . .

All 50 states have statutes worded substantially similar to the Washington statute. *See Hearings on H.R. 271 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess., 324–46 (1967) [hereinafter cited as *Hearings*], which contains a compilation of state statutes relating to misuse of the flag.

Flag protection statutes generally punish two categories of "wrongful" treatment, or misuse, of the flag: (1) flag *desecration*, which is conduct, such as burning, mutilating, or contemptuous treatment, evincing hostility toward or disrespect for the flag, *see* note 53 *infra*; and (2) *improper use*, which includes use of the flag in commercial advertising, affixation of foreign articles to the flag, and the like. Thus, improper use may be viewed as less severe misuse of the flag than desecration.

3. State v. Spence, 81 Wn. 2d 788, 506 P.2d 293 (1973). The state supreme court reversed a Washington Court of Appeals decision which had reversed the conviction because of statutory overbreadth. State v. Spence, 5 Wn. App. 752, 490 P.2d 1321 (1971).

4. The per curiam opinion apparently expressed the views of five members of the Court. Chief Justice Burger and Justices White and Rehnquist dissented. Justice Blackmun concurred only in the result. Justice Douglas concurred with a brief separate opinion, joining Justices Brennan, Stewart, Marshall, and Powell in the majority.

5. The term "government" will be used in this note to refer both to state and federal

will demonstrate, the ruling restricts that governmental power significantly. The decision in *Spence* clears the way for the court to hold, in future cases of flag misuse, that all noncommercial, unorthodox use of the flag is protected by the first amendment.

I. BACKGROUND

A. The Court's Protection of Free Expression

The full expression of all social and political views is of time-honored importance in our society, which depends on the interchange of ideas as an essential ingredient of self-government.[6] For this reason, freedom of expression occupies a "preferred" position[7] in our constitutional jurisprudence. The first amendment embodies the nation's decision to risk whatever unpleasantness may result from free dissemination of all, even unpopular, views, in return for the insurance this provides against governmental domination and control of thought.[8]

The Supreme Court has interpreted the first amendment's free speech clause in numerous, diverse factual contexts, including punish-

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governmental entities. Because the first amendment applies with equal force to both the federal and state governments, Gitlow v. New York, 268 U.S. 652 (1925), the scope of governmental power to regulate flag misuse, absent exercise of federal preemption, is the same for both. For a brief discussion of federal preemption in this area, see note 92 *infra*.

6. Dr. Alexander Meiklejohn theorized that the first amendment exists to protect the right of the citizenry to self-government, rather than the right of private individuals to speak. It promotes the dissemination of information and views on all sides of matters of general public import, assuring that voters have the opportunity to weigh competing values for themselves before exercising their franchise. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

Professor Thomas Emerson suggests that the maintenance of a system of freedom of expression protects four important values: (1) individual self-fulfillment; (2) the attainment of truth; (3) participation by the members of the society in social, including political, decisionmaking; and (4) maintenance of the balance between stability and change in society. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3-15 (Random House ed. 1966) [hereinafter cited as EMERSON].

7. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Thomas v. Collins, 323 U.S. 516, 529-30 (1945). A critical discussion of the first amendment's preferred status is presented in Kovacs v. Cooper, 336 U.S. 77, 89-96 (1949) (Frankfurter, J., concurring).

8. New York Times Co. v. Sullivan, 376 U.S. 254, 273-76 (1964). *But see* Lehman v. City of Shaker Heights, 94 S. Ct. 2714 (1974) (municipal policy of not permitting political advertising but allowing other types of advertising on transit vehicles held not violative of political candidate's first amendment rights).

ment of political advocacy,[9] freedom of belief,[10] right of association,[11] defamation and criminal libel, [12] "fighting words,"[13] obscenity,[14] picketing,[15] and leafleting,[16] to name but a few. In so doing, the Court in the last half-century has used several, sometimes conflicting, approaches to first amendment adjudication. At one time, the government could suppress communication merely by showing that the communication had a "bad tendency"—a tendency to "corrupt morals, incite to crime, or disturb the public peace."[17] The bad tendency test was in conflict with Justice Holmes' stricter "clear and present danger" test[18] for some years. The clear and present danger test, which enjoyed its widest use in the 1940's,[19] required, in its "mature" application, that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be pun-

9. *See, e.g.,* Brandenburg v. Ohio, 395 U.S. 444 (1969) (upholding right to inflammatory speech where imminent lawless action not likely); Schenck v. United States, 249 U.S. 47 (1919) (upholding conviction under Espionage Act for attempting to cause insubordination in the military by circulation of leaflets; "clear and present danger" present).

10. *See, e.g.,* Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961) (states may require bar applicants to indicate whether they advocate violent overthrow of government); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (salute to flag cannot be compelled).

11. *See, e.g.,* NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449 (1958) (upholding refusal of NAACP to disclose membership lists to state).

12. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel of public figures is protected unless done with "actual malice," *i.e.,* knowledge of falsity or reckless disregard of truth); Gertz v. Robert Welch, Inc., 94 S. Ct. 2997 (1974) (defamation of private figure, even when concerning issues of public interest, need not include actual malice); Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding group libel law prohibiting defamation of a race).

13. *See, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding breach of peace conviction for use of personally abusive epithets). *But cf.* Plummer v. City of Columbus, 414 U.S. 2 (1973) (male cab driver's vulgar and abusive language toward female passenger, though "fighting words," unpunishable because of facial overbreadth of ordinance); Lewis v. New Orleans, 415 U.S. 130 (1974) (abusive language toward police protected due to facial overbreadth of ordinance).

14. *See, e.g.,* Miller v. California, 413 U.S. 15 (1973) (formulating standards by which sexually oriented material is to be constitutionally evaluated).

15. *See, e.g.,* Edwards v. South Carolina, 372 U.S. 229 (1963) (reversing breach of peace conviction of blacks who peacefully demonstrated near state capital building); Thornhill v. Alabama, 310 U.S. 88 (1940) (peaceful labor picketing protected).

16. *See, e.g.,* Schneider v. State, 308 U.S. 147 (1939) (state interest in preventing littering does not justify prohibition on leafleting); Lovell v. Griffin, 303 U.S. 444 (1938) (voiding permit system for handbills).

17. Gitlow v. New York, 268 U.S. 652, 667 (1925).

18. The test was first formulated in Schenck v. United States, 249 U.S. 47 (1919), but did not win the approval of a majority of the Court until Herndon v. Lowry, 301 U.S. 242 (1937), wherein the Court held that the "dangerous tendency" of words was insufficient to justify abridgment of speech.

19. *See, e.g.,* Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949); Thornhill v. Alabama, 310 U.S. 88, 105 (1940).

ished."[20] After a period of nonuse, the clear and present danger test was revived recently in *Brandenburg v. Ohio,*[21] in which the Court held that proscription of inflammatory advocacy is constitutional only where the advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[22]

Beginning with *Schneider v. State,*[23] the Court has on many occasions used an "ad hoc" balancing approach, weighing anew in each case the competing interests in free speech and public order and safety. This approach was justified in *Dennis v. United States:*[24]

> The demands of free speech in a democratic society as well as the interest in national security are better served by a candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.

The demise of the balancing test was suspected after *United States v. Robel,*[25] in which the Court declined to adopt a balancing approach, resting its decision instead upon the presence of less restrictive means for Congress to realize its desired objective.[26] But reversion to a balancing approach soon followed.[27] Thus, no one test has been exclu-

20. Bridges v. California, 314 U.S. 252, 263 (1941).
21. 395 U.S. 444 (1969).
22. *Id.* at 447.
23. 308 U.S. 147 (1939).
24. 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring) (case sustained constitutionality of, and upheld convictions under, the Smith Act, which prescribed advocacy of the overthrow by force and violence of the government of the United States).
25. 389 U.S. 258 (1967).
26. The Court stated:
> We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. . . . [W]e have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.

Id. at 268 n.20. For earlier less-restrictive-means cases, see Shelton v. Tucker, 364 U.S. 479, 488 (1960); Talley v. California, 362 U.S. 60 (1960).
27. *See, e.g.,* Pickering v. Board of Education, 391 U.S. 563 (1968); Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551 (1972).

sively utilized by the Court.[28]

B. Symbolic Speech Adjudication

One reason for challenges to the constitutionality of statutes punishing flag misuse has been the Court's failure to establish a satisfactory doctrinal framework[29] within which to address the question of whether the first amendment protects nonverbal communication,[30] or "symbolic speech."[31]

In 1968, concerned that "an apparently limitless variety of conduct [might] be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,"[32] the Court in *United States v. O'Brien*[33] affirmed a conviction for burning of a draft card in violation of federal law.[34] The Court reasoned that the constitutional grant of power to Congress to raise and support armies provided Congress

28. Both the clear and present danger test and ad hoc balancing test have been subjected to strong criticism. Professor Meiklejohn suggested that the first amendment itself has already struck any balance to be made in favor of free expression. Moreover, he believed that any judicially created test such as the clear and present danger test allows government to suppress free speech at those times when a self-governing people needs it the most—times of crisis when a fully informed citizenry is most necessary to assure that correct and wise decisions are made. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). Justices Black and Douglas have been the most active judicial proponents of this "absolutist" approach, *see, e.g.,* Konigsberg v. State Bar of Calif., 366 U.S. 36, 60–61 (1961) (Black, J., dissenting); New York Times Co. v. United States, 403 U.S. 713, 720 (1971) (Douglas, J., concurring), which thus far has failed to gain widespread following on the Court.

29. A principled method of first amendment adjudication is necessary in order to assure that the personal predilections of individual justices and courts' tendencies to accord greater weight to legislative judgments than to interests protected by the first amendment are eschewed in the decision-making process. *See* EMERSON, note 6 *supra,* at 54–56. *See also* Frantz, *Is the First Amendment Law—A Reply to Professor Mendelson,* 51 CALIF. REV. 729, 746–49 (1963), pointing out that *any* result is possible when balancing tests are used because judicial characterization of the respective interests to be balanced largely determines the weight to be assigned each.

30. A subquestion to be addressed is whether the first amendment protects unorthodox use of the American flag.

31. As used in this note, "symbolic speech," "symbolic expression" and "symbolic conduct" have the same meaning—expressive or communicative conduct which, although perhaps violative of a statute directed at other than verbal speech, may be protected by the first amendment. The Supreme Court uses the terms "expression" and "communication" in place of "speech" frequently. *See, e.g.,* Police Dept. v. Mosley, 408 U.S. 92, 95 (1972) ("expression"); Pell v. Procunier, 94 S. Ct. 2800, 2806 (1974) ("communication").

32. United States v. O'Brien, 391 U.S. 367, 376 (1968).

33. 391 U.S. 367 (1968).

34. 50 U.S.C. § 462(b)(3) (1970).

the authority to regulate conduct which interfered with the government's legitimate interest in a smoothly functioning draft system. Prohibition of draft-card burning, it continued, assures that registrants have their cards in their possession at all times, and thus promotes the government's interest. In reaching its decision the Court developed the following four-part test:[35]

> [W]e think it clear that a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important and substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The *O'Brien* framework and its application are unsatisfactory for several reasons. First, the Court denominated as "substantial" the governmental interest in assuring that all registrants retain their draft cards in their possession. In reality, this is no more than an interest in administrative convenience.[36] Second, the statute was underinclusive, prohibiting only one subclass of conduct (destroying draft cards by burning)—conduct intended to be communicative—within the total range of evil sought to be cured (nonpossession of draft cards). This suggests that the statutory prohibition, if not the underlying "governmental interest," was *not* "unrelated to the suppression of free expression," but in fact directly related to that end. Finally, the Court allowed mere "furtherance" of a governmental interest to override the right of free expression. More appropriate in the first amendment area is the requirement that expressive conduct, to be prohibited, must interfere with a governmental interest in a *substantial* manner.[37] Only then is symbolic expression accorded the same level of constitutional protection as is provided to "pure speech."[38]

35. 391 U.S. at 377.

36. *See* Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 22 (1968). Professor Alfange also points out that, as used by the Court, "substantial governmental interest" means an interest "having substance," rather than, as its normal usage would suggest, a strong, or compelling, interest. *Id.* at 23–24.

37. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. REV. 29, 42–44 (1973) [hereinafter cited as Nimmer].

38. The Court has distinguished "pure", or verbal, speech from "speech plus"—that communication, such as picketing, leafleting or demonstrating, which includes

A year after *O'Brien,* the Court in *Tinker v. Des Moines School District*[39] adopted the more appropriate standard and held that high school students could not constitutionally be prevented from wearing black armbands to school to protest the Vietnam war. The Court noted that "[T]he wearing of armbands . . . was closely akin to 'pure speech' which . . . is entitled to comprehensive protection . . . ."[40] In contrast to *O'Brien's* "furtherance" standard, the *Tinker* Court stated that symbolic conduct interfering with a legitimate state interest must do so "materially and substantially"[41] before its restriction may be justified. The posited state interest in *Tinker,* preservation of order at the school, would have been "furthered" by prohibiting the armbands, since disruption would have been nonexistent in their absence. Furtherance of the state interest in this manner would have satisfied the test formulated in *O'Brien*: The restriction of first amendment freedoms was "essential" to further the state's interest—even stationing police throughout the school would not have ensured perfect tranquility. The result in the two cases was different only because the symbolic conduct in *Tinker* was accorded first amendment protection commensurate with that given pure speech.[42]

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non-"pure" aspects. *See, e.g.,* Cox v. Louisiana, 379 U.S. 536, 555 (1965); NAACP v. Button, 371 U.S. 415, 455 (1963) (Harlan, J., dissenting). *See also* Professor Kalven's cogent criticism of the pure speech-speech plus dichotomy. Kalven, *The Concept of the Public Forum,* 1965 SUP. CT. REV. 1, 23–25 (1965).

When pure speech is involved, "furtherance" of a legitimate state interest (one "within the constitutional power of government") is not a sufficient justification for restricting communication. For example, prohibiting inflammatory speech generally would certainly "further" the state's interest in preventing disorder, a state interest "unrelated to the suppression of free expression." But even where speech actually prompts disorder, restriction of that speech, which is all that is "essential to the furtherance of that interest," is prevented by the first amendment in the absence of a "clear and present danger of a serious and substantive evil that rises far above public inconvenience, annoyance or unrest." Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

39. 393 U.S. 503 (1969).

40. *Id.* at 505–06.

41. *Id.* at 509.

42. The slight disruption engendered by the symbolic conduct in *Tinker* could not justify its prohibition. Compare Feiner v. New York, 340 U.S. 315 (1951), where the immediacy of physical danger to an intentionally inflammatory and provocative speaker from a hostile audience, and the absence of adequate police personnel to protect him, were held to justify his arrest for disturbing the peace. *See also* the characterization of *Feiner* in Cohen v. California, 403 U.S. 15, 20 (1971). *But see* Edwards v. South Carolina, 372 U.S. 229 (1963); Terminiello v. Chicago, 337 U.S. 1 (1949).

C. *Flags, Symbolic Speech and the First Amendment*

Flags have for some time played a role in developing doctrinal frameworks within which to address both first amendment and due process issues.[43] In 1907, the Court in *Halter v. Nebraska*[44] decided that use of the American flag in commercial advertising could constitutionally be proscribed. Over 40 years ago, in *Stromberg v. California*,[45] the Court held invalid a statute prohibiting display of a red communist flag as a symbol of opposition to organized government. Refusal to salute the American flag was held protected in *West Virginia State Bd. of Educ. v. Barnette*.[46]

The Court confronted four cases involving misuse of the American flag in the 5–year interval between *Tinker* and *Spence*, but failed to reach the symbolic speech question in each instance. The same Term it decided *Tinker*, the Court declined to confront the question of con-

43. The United States flag was adopted by resolution of the Continental Congress on June 14, 1777. 2 JOURNALS OF THE AMERICAN CONGRESS 165 (1823). The present form of the flag is prescribed by statute, 4 U.S.C. § 1 (1970), which is implemented by Executive Order No. 10834, 24 C.F.R. 6865 (1959). Widespread use of the flag in commercial advertising in the latter part of the 19th century prompted the appearance of flag protection statutes, beginning with South Dakota's in 1897. Ch. 22–9–1, –2 (1967). *See* Mittlebeeler, *Flag Profanation and the Law*, 60 KY. L.J. 885, 888 & 893 (1970). In 1917 the National Conference of Commissioners of Uniform State Laws presented to the states a Uniform Flag Act, which has since been adopted in 16 states. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATES LAWS 373 (1971). Most other flag protection statutes are patterned after the Uniform Act. *See Hearings*, note 2 *supra*, at 324–46.

The first federal flag protection legislation appeared in 1917, when Congress enacted an "improper use" statute applicable to the District of Columbia. 4 U.S.C. § 3 (1970). The federal flag desecration law, which applies throughout the nation, was not enacted until 1968. 18 U.S.C. § 700 (1970).

44. 205 U.S. 34 (1907). *See* note 89 *infra*. In *Halter* the Court ruled that neither fourteenth amendment due process nor privileges and immunities were infringed by the statute in question, which closely resembled the statute in *Spence*. The first amendment was not considered.

45. 283 U.S. 359 (1931). *Stromberg* was the first occasion for the Court to invalidate a statute "on its face," *i.e.*, without reference to the conduct at issue, for violating the first amendment. It was also the Court's first recognition that first amendment "speech" may include symbolic conduct.

46. 319 U.S. 624 (1943). The *Barnette* case was brought by Jehova's Witnesses, but turned on principles broader than those of freedom of religion:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . . .

Id. at 642. *Barnette* involved punishment for *failure to act* in a prescribed manner, whereas *Spence* involved punishment for *acting* in a proscribed manner. Nevertheless, *Barnette* is important for the Court's decision that behavior toward symbols, including the American flag itself, is not exempt from first amendment consideration.

stitutional protection for flag misuse in *Street v. New York*.[47] There, a conviction for flag burning was overturned because the statute involved permitted punishment for words contemptuous of the flag; since it could not be determined from the record whether defendant's conviction rested on his actions or on his accompanying derogatory language, reversal was mandated by the protection due "pure speech." The Court enumerated four conceivable state interests served by a flag desecration statute and found all four constitutionally wanting:[48] (1) deterrence of incitement to unlawful activity; (2) prevention of breaches of the peace caused by hostile reactions to contemptuous use of the flag; (3) protection of the sensibilities of passersby; and (4) assurance that citizens maintain proper respect for the flag.

In the second case, *Cowgill v. California*,[49] the Court dismissed defendant's appeal from a conviction for wearing a vest made from a flag. Although he concurred in the dismissal Justice Harlan noted the need to consider a case where the issue of "expressive" flag use was "adequately flushed."[50]

In *People v. Radich*,[51] the third case in the interval, an equally divided Court, with Justice Douglas not participating, affirmed a New York conviction for use of the American flag in an anti-war art exhibit.

Finally, three months before the *Spence* decision, the Court in *Smith v. Goguen*[52] confronted a Massachusetts statute subjecting to

47. 394 U.S. 576 (1969).

48. *Id.* at 590–91. The last three interests were examined and likewise rejected in *Spence*. 94 S. Ct. at 2731.

49. 274 Cal. App. 2d 923, 78 Cal. Rptr. 853 (App. Dep't. Super. Ct. 1969), *appeal dismissed*, 396 U.S. 371 (1970).

50. *Id.* at 372.

51. 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846, *aff'd by an equally divided court*, 401 U.S. 531 (1971). The exhibit included a representation of the flag draped over a phallic symbol. Although no opinions accompanied the affirmance, the identity and reasoning of the Justices on each side of the question may be guessed with some probability of accuracy. Justices Black and White, dissenters in *Street*, likely voted to affirm. They were no doubt joined by Chief Justice Burger and Justice Blackman, both of whom dissented in *Smith v. Goguen*, 415 U.S. 566 (1974) (discussed at notes 52–67 and accompanying text *infra*). Thus, those willing to reverse were probably Justices Harlan, Brennan, Stewart and Marshall. Had Justice Douglas participated, *Spence* would probably have been unnecessary. The Court's action in *Radich* might be explainable as a reluctance to use that case's factual setting as the vehicle for the result reached in *Spence*—a holding which, on any facts, is quite distasteful to many American vexillophiles. *Compare* Van Slyke v. Texas, 94 S. Ct. 3198 (1974), discussed at note 124 *infra*.

52. 415 U.S. 566 (1974).

criminal liability anyone who "treats contemptuously" the flag of the United States.[53] In *Goguen* defendant had worn a replica of the American flag sewn to the seat of his pants. Attacking his conviction by habeas corpus, he prevailed in the United States district court[54] on grounds that the statute was unconstitutionally vague and overbroad.[55] The court of appeals affirmed.[56] The Supreme Court, without addressing the overbreadth issue, affirmed on the vagueness ground, holding that the statutory language, as applied to Goguen, violated the due process clause of the fourteenth amendment.[57]

53. MASS. GEN. LAWS ANN. ch. 264, § 5 (1971). All but nine states have statutes prohibiting "contemptuous" treatment of the flag. *Hearings*, note 2 *supra*, at 324–46. Eight of these—Alaska, California, Connecticut, Minnesota, Nevada, New Jersey, Oklahoma and Wyoming—prohibit "defiling" the flag. *id.*, while the ninth, Texas, prohibits "knowing[ ] desecrat[ion]." TEX. PENAL CODE § 42.09 (West 1974); both latter types of statutes seem similar in effect. (Compare the definition of "defile" with that of "desecrate." WEBSTER'S THIRD NEW INT'L DICTIONARY 592, 610 (1961).)

54. Goguen v. Smith, 343 F. Supp. 161 (D. Mass. 1972). The conviction had been affirmed by the Massachusetts Supreme Court. Commonwealth v. Goguen,— Mass.—, 279 N.E.2d 666 (1972).

55. For what are widely regarded as the best discussions of the vagueness and overbreadth doctrines, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). The overbreadth issue was presented in both *Goguen* and *Spence*. Had the Court in either case found the statute involved facially overbroad, many of the state and federal flag protection stututes would have been invalidated. *See* note 53 *supra*. Briefly stated, the overbreadth doctrine calls for reversal of convictions obtained under statutes which sweep within their scope activity protected by the first amendment, because of the danger of statutes which discourage free expression. A statute may be invalidated as "facially" overbroad, without regard to whether the immediate conduct in question might constitutionally be proscribed. *See, e.g.*, Plummer v. City of Columbus, 414 U.S. 2 (1973). Or, where a statute is not facially overbroad, it may nevertheless by overbroad "as applied," *i.e.*, unconstitutional in its application to the particular conduct before the court. *See, e.g.*, Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) (limiting construction on appeal does not validate conviction under ordinance prohibiting protected activity). For a recent instance of the Court concluding that a statute, although susceptible of reaching a not-insignificant proportion of protected conduct, was neither facially overbroad nor overbroad as applied, see Broadrick v. Oklahoma, 413 U.S. 601 (1973).

56. Goguen v. Smith, 471 F.2d 88 (1st Cir. 1972). Senior Circuit Judge Hamley, sitting by designation from the Ninth Circuit, concurred in the result but preferred to rely on the vagueness ground alone, finding no need to reach the overbreadth issue. Thus, his disposition of the case was similar to the Supreme Court's.

57. 415 U.S. at 578. The Court summarized the vagueness doctrine's purposes. *Id.* at 572–73. Grayned v. City of Rockford, 408 U.S. 104, 108–14 (1972), more extensively explained those purposes: (1) that persons of ordinary intelligence not be punished where they are unable to ascertain what conduct is expected of them; (2) that arbitrary enforcement be avoided by requiring explicit standards for those who enforce the law; and (3) that first amendment freedoms not be inhibited by uncertainty as to whether particular conduct is proscribed. In *Grayned*, the Court refused to rule that a statute prohibiting noise near schools was vague as applied, in spite of the fact that defendant's conduct, on the record, did not appear to contravene the

The *Goguen* Court purported to reach its result without considering whether unorthodox flag use may constitutionally be proscribed.[58] The Court did note that where a statute's literal sweep reaches expression protected by the first amendment, the vagueness doctrine requires a greater degree of specificity than in other contexts.[59] But the decision was based on the failure of the statute to meet the less stringent requirement, applicable to all statutes, that legislation establish minimal guidelines to govern law enforcement.[60]

Justice White, though not agreeing that the statute was vague, concurred in the judgment on first amendment grounds.[61] He emphasized

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statute. Failure of counsel to raise the as-applied argument was apparently responsible. 408 U.S. at 106 n.1.

58. 415 U.S. at 583 n.32.

59. *Id.* at 573. State statutes may be judicially narrowed and construed by state courts to eliminate defects of vagueness. In the absence of state court construction, which was absent in *Goguen,* the Supreme Court evaluates statutes as they appear before it. United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971). Because of the importance of first amendment expression in this society, and because regulations relating to economic enterprise are likely to be consulted beforehand by those affected, a "double standard" of vagueness scrutiny exists. A stricter standard of scrutiny is applied to statutes infringing upon first amendment, as opposed to non-first amendment, interests. This point was illustrated in Ashton v. Kentucky, 384 U.S. 195 (1966), wherein a conviction for the common law offense of criminal libel was reversed. The Court stated:

> Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.

Id. at 200 (footnotes omitted).

60. 415 U.S. at 574. The "treats contemptuously" language was declared to be:

> void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court and jury were free to react to nothing more than their own preference for treatment of the flag.

Id. at 578. The Court rejected the argument that Goguen was an extreme, or "hard-core" violator, one whose conduct was clearly prohibited by the statute.

It is important to distinguish between the judicially created "as-applied" and "facial" vagueness tests. For example, a statute which is vague with regard to the permissibility of *some* acts may be clearly prohibitive of others. A defendant whose conduct fell in the vague category could prevail on the theory that the statute as applied to him was vague. A defendant whose conduct was clearly prohibited, *i.e.,* a "hard-core" violator, would prevail only if the entire statute was drawn in language so broad as to reach a significant proportion of protected conduct. Here the lines between due process vagueness theory and first amendment overbreath theory blur. *See* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 871–75 (1970).

61. 415 U.S. at 583–90. The three dissenting Justices agreed with Justice White that the statute was not vague. Justice Blackmun, joined by the Chief Justice, considered the statute and conviction thereunder valid under the first amendment because the statute had been determined by the Supreme Judicial Court of Massachusetts not to punish speech, and because Goguen *did* violate the physical integrity of the flag by affixing it to his pants. *Id.* at 590–91; *see* note 62 and accompanying text *infra.*

Justice Rehnquist, also joined by the Chief Justice, dismissed the vagueness contention:

that under the statute a conviction of Goguen required a jury finding that he had expressed contempt for the flag, *i.e.*, that he had communicated an idea. Justice White indicated a willingness to uphold a statute protecting the "physical integrity" of the flag, believing such a measure to be within the constitutional power of the state or nation.[62] Nonetheless, he reasoned that since Goguen did not deface the flag in any manner, conviction would not protect any legitimate governmental interest, but would rather impermissibly punish communication. Such a proscription of protected speech, suggested Justice White,

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[T]he Supreme Judicial Court would read the language (of the statute) . . . as carrying the clear implication that the contemptuous treatment . . . must involve some actual physical contact with the flag itself.

Id. at 597. To Justice Rehnquist, this "clarification" removed constitutional objections to Goguen's conviction under the statute, although it appears that contemptuous contact with the flag is not much easier to discern than is contemptuous treatment thereof. (Interestingly, the Ohio Supreme Court, in State v. Kasnett, 34 Ohio St. 2d 193, 297 N.E.2d 537 (1973), used similar reasoning to reach the opposite conclusion. *Kasnett* also involved a conviction for contemptuous flag treatment for wearing a flag affixed to the seat of the pants. The court, reading "cast contempt upon" in light of the relevant statute's parallel prohibitions of mutilation, burning and trampling on the flag, concluded that only that contemptuous treatment involving such physical abuse of the flag was intended by the legislature to be prohibited. Since wearing of a flag on one's clothing did not amount to such abuse, defendant's conviction was reversed.)

Viewing protection of the physical integrity of the flag as a legitimate government interest, the Justice asserted that the statute served precisely that interest. He concluded with an account of the political, historical, literary, musical and emotional significance of the flag, designed to demonstrate that because of the unique place of the flag in the life of our nation, its physical integrity should override the integrity of the first amendment. To this writer, however, Justice Rehnquist's efforts only further the impression that protection of the *physical integrity* of the flag is in reality protection of its *meaning*. Such protection is an "anti-speech" governmental interest, one that is clearly not "unrelated to the suppression of free expression" as required by *O'Brien*. *See* text accompanying notes 109–15 *infra*.

62. 415 U.S. at 586. Justice White noted that the Founders must not have felt that specifying a flag by law for the nation violated the first amendment, because the first Congress did so. Act of Jan. 13, 1974 ch. 1, 1 Stat. 341. But he failed to mention that laws punishing flag misuse were not enacted until more than 100 years later. *See* note 43 *supra*.

Protection of the "physical integrity of the flag" appears to have different meaning for different members of the Court. Chief Justice Burger and Justice Rehnquist apparently view most if not all unorthodox use of the flag as impairing the interest in its physical integrity, since they were able to find that interest contravened in both *Goguen* and *Spence*. Justice White thought that merely affixing a flag to clothing, as in *Goguen*, did not impair the flag's physical integrity, while he thought that placing tape on it in *Spence* did. Conversely, Justice Blackmun thought the flag's integrity violated in *Goguen*, but apparently not in *Spence*, perhaps because there the tape was removable. The majority in *Goguen* did not decide the legitimacy of the governmental interest in the flag's physical integrity, while in *Spence* the same majority assumed that even if such a governmental interest were legitimate, that interest was not significantly impaired.

violated the *O'Brien* requirement that a governmental purpose, in order to be valid, must be "unrelated to the suppression of free expression."[63]

One may question whether the Court's opinion in *Goguen* is both disingenuous in its failure to acknowledge that Goguen's conduct was sufficiently disrespectful of the flag to be deemed contemptuous,[64] and evasive in its failure to state whether Goguen's conduct may be prohibited consistent with the first amendment.[65] Vagueness shortcomings were not perceived by those Justices who believed that the conduct *could* be constitutionally punished.[66] Result-oriented jurisprudence is suggested by the fact that, with the exception of Justice Blackmun, the same Justices who viewed the statute in *Goguen* as vague also found the flag display in *Spence* protected.[67]

II. THE COURT'S REASONING IN *SPENCE*

Spence occasioned further recognition by the Court of the right of symbolic speech. The statute under which Spence was convicted was not held invalid on its face. The Court, in a per curiam opinion expressing the views of five members of the Court, merely ruled that "as applied to appellant's activity the Washington statute impermissibly infringed protected expression."[68] Rather than attempt to set bounds

63. United States v. O'Brien, 391 U.S. 367, 377 (1968).

64. *Cf.* State v. Kasnett, 30 Ohio App. 2d 77, 283 N.E.2d 636 (1972), which also involved a flag worn on the seat of the pants, wherein the court stated:

> [W]earing the flag, or part of it, on that part of the clothing covering the human fundament, a part of the human body universally and historically considered unclean, and the object of derision and scorn and the reference to which in a certain tenor is often the source of fighting words, was a clear act of defilement in that the flag was thus dishonored . . . .

283 N.E.2d at 639. The judgment affirming conviction was reversed on appeal to the Ohio Supreme Court. State v. Kasnett, 34 Ohio St. 2d 193, 297 N.E.2d 537 (1973). *See* note 61 *supra.*

65. A decision based on the asserted vagueness of a statute is itself vague unless it spells out what *are* the limits of governmental power to legislate in a given area. Moreover, to rule that "treats contemptuously" is vague *as applied* is to imply that it may not be vague in other settings. Yet the Court gave no clue as to what those settings might be. Indeed, it also asserted that such a statutory provision "has no core," 415 U.S. at 578, which would indicate that the Court was in reality invalidating the relevant section of the statute *on its face,* rather than merely as applied to Goguen. If this is true, then all the similar state provisions lacking judicial narrowing are likewise invalid. *See* note 53 *supra.*

66. *See* note 61 *supra.*

67. *See* note 61 and accompanying text *supra;* note 92 and accompanying text *infra.*

68. 94 S. Ct. at 2728.

on governmental power to regulate unorthodox flag use, the Court chose to examine a number of possible bases for conviction and to reject each one, often on the basis of factors peculiar to *Spence*. Thus, the Court implied that, on different facts,[69] violation of a flag protection statute might constitutionally be punishable.

Four features of Spence's flag display were considered by the Court.[70] Consideration of the first two, that the flag was privately owned and that it was displayed on private property, sheds little light on the scope of constitutional protection for flag misuse: If the flag had been publicly owned, first amendment interests would simply not have been at issue.[71] Even if privately owned, display of the flag in public areas would not foreclose reasonable regulation as to "time, place and manner"[72] of its expressive use. The third fact considered was that no breach of the peace or risk of the same accompanied Spence's flag display.[73] The Court's treatment of this factor likewise fails to illuminate the scope of the constitutional validity of flag protection statutes, but suggests that breach of the peace is a relevant factor. More helpfully, in *Street v. New York*,[74] the Court *refused* to apply a flag misuse statute that was not so narrowly drawn as to punish only those instances of desecration actually provoking, or inherently likely to provoke, violent retaliation.[75] Conceivably, a statute

69. *See* text accompanying notes 79, 80, 81 & 123 *infra*.

70. 94 S. Ct. at 2729–30.

71. The federal and state governments may constitutionally protect the destruction of public property through statutes designed for that purpose. Such protection is unrelated to the suppression of free expression—prohibitions of destruction of government property seek to protect the public fisc rather than to involve the government in deterrence of speech. *See, e.g.*, WASH. REV. CODE § 9.61.010 (Supp. 1972), for a state statute which could properly be applied to protect state-owned flags. 18 U.S.C. § 1361 (1970) is the federal analogue.

72. 94 S. Ct. at 2729. Reasonable "traffic controls" on expression, to use Professor Emerson's phrase, do not abridge free speech but enhance it by assuring that one message may not overwhelm others or conflict with other public uses of its medium. *Emerson*, note 6 *supra*, at 101. For example, if Spence had displayed his flag while standing in the middle of the Seattle freeway during rush hour, his punishment would not raise first amendment problems. For an instance of constitutional regulation of *manner* of expression, see Kovacs v. Cooper, 336 U.S. 77 (1949), upholding an ordinance prohibiting use of vehicles with sound amplifiers emitting "loud and raucous noises." *See also* Lovell v. Griffin, 303 U.S. 444, 451 (1938); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Cantwell v. Connecticut, 310 U.S. 296, 306–07 (1940); and Poulous v. New Hampshire, 345 U.S. 395, 405–08 (1953).

73. 94 S. Ct. at 2729.

74. 394 U.S. 576, 592 (1969).

75. *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 572–73 (1942) ("fighting words" may be constitutionally punished).

so narrowly drawn or construed could be constitutionally applied. But such a statute loses its character as a flag protection statute and is effectively a breach-of-the-peace statute.[76]

The final and most important aspect of the case was that, as the State of Washington conceded,[77] Spence had engaged in a form of communication. Noting that the flag display occurred during the restive days of the Cambodian incursion and Kent State tragedy, the Court recognized that the meaning of the display would have been obvious to most people at that time.[78] Thus, the Court concluded:[79]

> [T]he nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.

The Court further observed that the act was not one of "mindless nihilism," but rather "a pointed expression of anguish" over government policies,[80] suggesting that flag misuse with less obvious communicative purpose, such as that in *Goguen,* might not be protected under a properly-drawn statute.[81]

Proceeding from the fact that Spence's conduct was communicative, the Court examined four state interests which might nevertheless justify suppression of the conduct. First, the Court rejected as "totally without support in the record" the argument that the statute could be defended because it served to discourage breaches of the peace.[82]

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76. *See, e.g.,* Feiner v. New York, 340 U.S. 315 (1951) (inflammatory speaker's intentional incitement of hostile audience in absence of adequate police protection justifies speaker's arrest for breach of peace). *See* text accompanying notes 127–29 *infra.*

77. 94 S. Ct. at 2729–30.

78. *Id.* at 2730. *Cf.* Note, 68 COLUM. L. REV. 1091, 1113–17 (1968), proposing that symbolic conduct be capable of being understood as such to be protected.

79. 94 S. Ct. at 2730.

80. *Id.*

81. Justice Harlan, concurring in Cowgill v. California, 274 Cal. App. 2d 923, 78 Cal. Rptr. 853 (App. Dep't Super. Ct. 1969), *appeal dismissed,* 396 U.S. 371, 372 (1970), suggested that the difficulty in determining what was *meant* by the conduct was the reason for dismissal of defendant's appeal from a conviction for wearing a flag vest. *See* text accompanying notes 49–50 *supra.*

82. 94 S. Ct. at 2731. "Fighting words," personally abusive epithets which, when addressed to the ordinary citizen, are inherently likely to provoke violent reaction, may be punished as a breach of the peace. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Generally, however, danger of violence in other contexts must be shown to be "imminent" to justify suppression of communication. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Moreover, a violent reaction by an unsympathetic audience to communication does not cause it to lose its protected status; the state's responsibility is to protect the right of the speaker to deliver his message. Edwards v.

Relying on *Street v. New York*[83] and *Cohen v. California*,[84] the Court refuted a second possible state interest, "protect[ion of] the sensibilities of passersby,"[85] which arguably justified suppression of Spence's conduct.[86] Third, the Court commented that *Street* and *West Virginia State Bd. of Educ. v. Barnette*[87] dictated that Spence could not be punished for failing to show "proper respect" for the flag.[88]

Finally, the Court considered the state's interest in preserving the physical integrity of the flag to maintain it as a symbol of the nation.[89] The Court declined to determine under what circumstances that state interest would be a valid one. However, it opined that even if the interest were valid, the statute as applied to Spence was unconstitutional.[90] Because the flag was not permanently disfigured or de-

South Carolina, 372 U.S. 229 (1963); Terminiello v. Chicago, 337 U.S. 1 (1949). *See also* note 13 and accompanying text *supra;* notes 128–29 and accompanying text *infra.*

83. 394 U.S. 576 (1969). *See* text accompanying notes 47–48 *supra.*

84. 403 U.S. 15 (1971). Cohen was convicted of disturbing the peace by "offensive conduct" for wearing a jacket bearing the words "Fuck the Draft." The Supreme Court reversed on first amendment grounds: "Those [viewing the words on the jacket] could effectively avoid further bombardment of their sensibilities merely by averting their eyes."*Id.* at 21. Given the indefiniteness of the statutory language—"offensive conduct"—the Court could have disposed of *Cohen* on vagueness or overbreadth grounds, but chose instead to reach the first amendment issue. *Cf.* Coates v. Cincinnati 402 U.S. 611 (1971) (ordinance prohibiting "annoying" conduct held facially vague and overbroad).

85. 94 S. Ct. at 2731.

86. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Street v. New York, 1394 U.S. 576, 592 (1969), *quoted in* Spence v. Washington, 94 S. Ct. 2727, 2731 (1974).

87. 319 U.S. 624 (1943). *See* note 46 and accompanying text *supra.*

88. 94 S. Ct. at 2731.

89. The Washington Supreme Court, relying on Halter v. Nebraska, 205 U.S. 34, 42 (1907), had asserted this interest without defining or explaining it. State v. Spence, 81 Wn. 2d 788, 799, 506 P.2d 293, 300 (1973). The dissenting opinions in both *Goguen* and *Spence* elaborated on this concept, viewing the interest of the state in preserving the physical and symbolic integrity of the flag as overriding any first amendment interests involved. *Halter* involved a representation of the American flag on a certain brand of beer. The case was decided without consideration of the first amendment—before application of that amendment to the states by virtue of the fourteenth amendment in Gitlow v. New York, 268 U.S. 652 (1925), and even before the "clear and present danger" test was formulated in Schenck v. United States, 249 U.S. 47 (1919). Moreover, the Court's denial of first amendment protection to commercial advertising in Valentine v. Chrestensen, 316 U.S. 52 (1942), greatly minimizes *Halter's* relevance to most present-day flag cases.

90. 94 S. Ct. at 2732–33. The Court noted, curiously, that even if the interest *were* valid, in Spence's case it was "directly related to" expression; therefore, the four-part *O'Brien* test was ostensibly not applicable. 94 S. Ct. at 2732 n.8. It would seem that the same logic could have been used in *O'Brien* itself: the governmental

stroyed, the interest of the state in preserving the physical integrity of the flag was not *"significantly* impaired."[91]

Justice Rehnquist, joined by the Chief Justice and Justice White, dissented.[92] Justice Rehnquist suggested that the majority's observation that Spence did not "permanently disfigure" the flag was misplaced, stating:[93]

> The true nature of the State's interest in this case is not only one of preserving "the physical integrity of the flag," but also one of preserving the flag as "an important symbol of nationhood and unity . . . ." It is the character, not the cloth, of the flag which the State seeks to protect.

Thus embracing the opinion in *Halter v. Nebraska,* [94] Justice Rehnquist emphasized his view that the flag, as a symbol of nationhood, may be statutorily protected since maintaining its integrity imposes only "incidental," not direct, limitations on free speech.[95]

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interest in assuring that all registrants have their draft cards in their possession was just as "directly related to" O'Brien's expression as the state interest in maintaining the flag's integrity was related to Spence's expression; therefore, the statute under which O'Brien was convicted was unconstitutionally applied. For a discussion of *O'Brien,* see text accompanying notes 32–38 *supra.*

91. 94 S. Ct. at 2732–33 (emphasis added). *See* notes 36–38 and accompanying text *supra.*

92. 94 S. Ct. at 2733–36. Justice Blackmun, a dissenter in *Goguen,* concurred in the result in *Spence* with no explanation. His reasoning in *Goguen,* that protecting the physical integrity of the flag is constitutionally permissible, would seem equally applicable here. Adherence to stare decisis does not explain his switch; *Goguen* was decided on vagueness grounds, *Spence* on first amendment grounds. Evidently the Justice could not bring himself to punish expression in such "pristine and classic form." Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

Chief Justice Burger offered a brief separate dissent in which he suggested that "each *state* . . . [should] decide how the flag, as a symbol of *national unity,* should be protected." 94 S. Ct. at 2733 (emphasis added). It would seem that the suggestion should be quite the opposite; as a symbol of *national* unity the flag should be subject only to federal regulation, if indeed any regulation is constitutional or even desirable. However, federal preemption of an area normally depends upon the Congress' intent to occupy the field. *See, e.g.,* Pennsylvania v. Nelson, 350 U.S. 497 (1956) (intent inferred from dominance of federal interest in area); California v. Zook, 336 U.S. 725 (1949) (intent must be clearly expressed). In the area of flag legislation, Congress has clearly indicated that it does not intend to occupy the field. The federal flag desecration statute, 18 U.S.C. § 700 (1970), provides in subsection (c) that state laws on the same subject shall remain in force. The federal improper-use statute, 4 U.S.C. § 3 (1970), is expressly limited in operation to the District of Columbia.

93. 94 S. Ct. at 2735–36 (footnotes omitted).

94. 205 U.S. 34 (1907); *see* note 89 *supra.*

95. 94 S. Ct. at 2734.

III. ANALYSIS OF THE FIRST AMENDMENT ISSUE IN FLAG MISUSE CASES

A. Flags as "Pure Communication"

As the *Spence* holding was limited to the factual setting of the case, a reasonable and satisfactory framework from which to evaluate other flag misuse cases, and other symbolic speech cases generally, remains to be established. At the outset, it should be recognized that, given the role of freedom of expression in this society, the *method* of delivering a message is not of itself constitutionally significant. Whether an idea is communicated by the spoken word or through the use of symbols has no bearing on its validity in light of the purposes of the first amendment.[96] Thus, it follows that only if a state interest in prohibiting use of the flag or other symbols as communication is comparable to a state interest justifying suppression of verbal communication should the prohibition be constitutionally valid.

Ideas expressed through conduct may perhaps be constitutionally suppressed more often than those expressed through verbal speech.[97] This is because conduct, such as parading and demonstrating,[98] or sit-ins,[99] may run afoul of legitimate state interests, *i.e.*, interests unrelated to restriction of expression, with more frequency than will verbal speech.

But when the American flag is the medium of expression, the situation is in reality always one of "pure communication." "[T]he Republic for which it stands"[100] is the meaning of the flag as a symbol; any intentional use of the flag is in some manner an expression of the user's feelings toward the meaning of the flag.[101] Because the flag is itself a symbol,[102] symbolic conduct, as opposed

96. *See* text accompanying notes 6–8 *supra*. For this reason the writer disagrees with the suggestion made by the Court in Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (upholding Oklahoma's version of the Hatch Act against facial overbreadth attack), that where conduct is involved the full range of constitutional protections for expression do not apply.

97. *See* Cox v. Louisiana, 379 U.S. 536, 555 (1965).

98. *See* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

99. *See* Adderly v. Florida, 385 U.S. 39 (1966).

100. 36 U.S.C. § 172 (1970) (flag salute).

101. Even some flag use in which it is difficult to discern an articulable meaning, *e.g.*, "camp" use of the flag in clothing, is at least an expression of the idea that the flag is not entitled to be treated with quasi-religious respect—an idea which could not be suppressed if communicated verbally.

102. The Court's language in West Virginia State Bd. of Educ. v. Barnette, 319

to verbal speech, communicates feelings most effectively toward it. As "pure" communication, such conduct warrants constitutional protection.

B. A Principled Framework for Symbolic Speech Adjudication

It has been suggested that symbolic conduct, to receive constitutional protection, must be motivated only by a desire to communicate[103] and be capable of being understood by others as communication.[104] Such reference to the actor's intent and to the audience's understanding comprises an unworkable and inconsistent standard for symbolic speech adjudication. Determining an actor's communicative intent or lack thereof may be very difficult. In many instances, such as Goguen's, symbolic conduct may not express a particular, definite message, but rather a generalized, inarticulable attitude or lack of a "proper" attitude toward a majority value or value object.[105] Moreover, such a standard would lead to inconsistent results. For example, in cases of flag misuse, reference only to whether the actor intended to communicate would only inconsistently serve the state interest in protecting the flag's integrity: An instance of clearly communicative flag misuse would go unpunished while an instance of less clearly communicative flag misuse could be punished, even where the amount of damage to the flag was greater in the former instance than in the latter.[106]

The difficulties with a decision-making framework in flag-misuse and other symbolic speech cases which considers the intent of the actor and the perception of the audience make more attractive a method which considers the nature of the *state* interest involved in suppressing communicative conduct. The first amendment itself

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U.S. 624 (1943), is especially appropriate here: "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *Id.* at 632.

103. Note, *Symbolic Conduct,* 68 COLUM. L. REV. 1091, 1109 (1968).

104. *Id.* The Court in *Spence* noted that the defendant's "message was direct," 94 S. Ct. at 2732, suggesting that a message less easily understood would be less likely to be held protected. The writer has been unable to find a case where lack of coherence of a *spoken* message has been held to justify its punishment.

105. *E.g.,* long hair on males in the middle 1960's was thought to bespeak an attitude of disdain for many of society's traditional values.

106. *E.g.,* tearing up the flag during an anti-war demonstration to express hostility toward the nation would be protected, while simply wearing it as a cape would not.

frames the issue from the vantage point of the government: "Congress shall make no law . . . abridging the freedom of speech . . . ." Thus, the Constitution suggests an analysis in each case of whether, in view of the government's asserted interest, particular conduct may be suppressed consistent with the first amendment.

The Court in *Street v. New York* advanced and rejected four conceivable governmental interests which might justify a conviction for *words* spoken concerning the flag.[107] That disrespect, contempt or even hatred of the flag or nation is demonstrated through conduct rather than by the spoken word does not conceptually affect the validity of those interests. The additional state interest advanced by the dissenters in *Goguen* and *Spence*—protection of the physical integrity of the flag—requires closer examination within a principled framework.

Professor Melville Nimmer has proposed the following useful construct for evaluating the validity of the state interest in symbolic speech cases:[108] If a statute prohibits conduct having only a "meaning" effect, the state interest may be characterized as "anti-speech." If a statute prohibits conduct having a "nonmeaning" effect, then the state interest may be characterized as "nonspeech." Both words and conduct may have "meaning" and "nonmeaning" effects. For example, words blared raucously from a sound truck have the meaning effect of communicating whatever message they contain; they have the nonmeaning effect of "assault[ing] the citizenry."[109] The governmental interest in preserving the public peace and protecting the privacy of persons off the streets is a nonspeech interest, concerned with the nonmeaning effect of the broadcasts. Thus, "government may turn them down."[110] Likewise, a political assassination, which is conduct, may have the meaning effect of communicating tremendous dissatisfaction with the existing order, while it has the nonmeaning effect of ending a human life. The state, in punishing the nonmeaning effect, is advancing a nonspeech, and therefore presumptively legitimate,[111] interest.

107. 394 U.S. 576, 590–93 (1969). *See* text accompanying notes 47–48 *supra*.
108. Nimmer, note 37 *supra*, at 38–46.
109. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972), *characterizing* Kovacs v. Cooper, 336 U.S. 77 (1949).
110. *Id.*
111. *See* note 117 *infra*.

If symbolic speech were accorded constitutional protection on a par with that given verbal speech, then anti-speech statutes regulating conduct would generally be unconstitutional; nonspeech statutes would be constitutional.[112]

C. *Disorder in the Court*

Justice Rehnquist, dissenting in *Spence,* sought to characterize the state's interest in preserving the physical integrity of the flag as nonspeech, in that operation of a statute such as the one in *Spence* does not depend on whether communication is present.[113] But as his dissenting opinion in *Goguen* had so eloquently demonstrated, protection of the flag's physical integrity is in actuality protection of its *meaning*:[114] any violation of the flag's physical integrity alters the meaning the state wishes to preserve. Therefore, that state interest is an anti-speech interest and constitutionally invalid. Because any state prosecution for flag misuse, whether improper use, desecration or otherwise, is in pursuit of this interest, *all* flag misuse (with the exception of commercial advertising, which does not enjoy first amendment protection),[115] should be sanction-free. The state may not assert an anti-speech interest and then claim that because communication is not clearly intended or clearly apparent,[116] its interest is nonspeech.

The *Spence* majority avoided the dissent's mischaracterization of the nature of the state's interest in the integrity of the flag. But, unwilling to flatly deny the validity of such an interest, the Court was left to treat Spence's flag display as though it had *both* meaning (commu-

112. With words, for instance, the nonspeech governmental interest in preserving order legitimizes the punishment of use of personally abusive epithets, or "fighting words," because of their great likelihood of provoking violent reaction by their object. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). However, offensive language which is not directed at a particular, nearby person, may not be punished because there is no comparable, nonspeech, governmental interest present; attempts to regulate the content and not the immediate effect of words are in pursuit of anti-speech governmental interests. *See* Cohen v. California, 403 U.S. 15 (1971).

113. 94 S. Ct. at 2736.

114. 94 S. Ct. at 1256–62; *see* note 61 *supra.*

115. Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376 (1973); Valentine v. Crestensen, 316 U.S. 52 (1942). Another possibly valid instance of application of flag protection statutes, in situations involving breach of the peace, is of uncertain constitutionality and, in any case, is redundant, given that breach-of-the-peace statutes may accomplish the same result. *See* note 76 and accompanying text *supra,* & notes 127–29 and accompanying text *infra.*

116. *See* notes 108–12 and accompanying text *supra.*

nication) and nonmeaning (violation of the flag's integrity) effects.[117] Even in making this erroneous assumption, however, the Court reached the correct result. The improper use statute was held unconstitutional as applied to Spence because the integrity of the flag was not *significantly* impaired. Thus, the Court accorded symbolic conduct first amendment protection commensurate with that given verbal speech, an implicit application of *Tinker* rather than *O'Brien.*[118]

Thus, movement from *O'Brien's* defective analytical framework,[119] despite the Court's disclaimer of its applicability,[120] is significant. Maintaining the physical integrity of the flag by prohibiting its adornment, a "restriction on First Amendment Freedoms . . . no greater than is essential to the furtherance of that interest,"[121] is no longer a sufficient justification for suppression of symbolic speech. If this is not the basis of the Court's holding, then one must conclude, in light of the *O'Brien* test, that such improper-use regulations are either not in furtherance of "an important and substantial governmental interest," not "unrelated to the suppression of free expression," or indeed not "within the constitutional power of the Government" at all.[122] A decision based on any of these latter considerations would logically apply

117. Conduct other than flag misuse may also have both meaning and nonmeaning effects, *e.g.,* O'Brien's act of draft-card burning expressed his disagreement with the Vietnam war, but also rendered him cardless, theoretically hampering the efficiency of the military. When such is the case, the validity of the statute in question should be a function of whether the state interest involved is an anti-speech or nonspeech interest If the state interest is anti-speech then the statute should not be applied. But where the state interest is a nonspeech one, the statute's application should be valid, subject to two important qualifications. *See* Nimmer, note 37 *supra,* at 38–44.

First, the statute may not be underinclusive, *i.e.,* prohibitive of only that subclass of conduct, within the class of evil ostensibly regulated, which is communicative or has a meaning effect. An underinclusive statute violates equal protection. *See* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 347–51 (1949). (In *O'Brien,* the statute punished only those instances of nonpossession resulting from symbolic destruction. *See* text accompanying notes 36–37 *supra*).

Second, to justify its suppression, the conduct must interfere with a "compelling" governmental interest, *see* NAACP v. Button, 371 U.S. 415, 438 (1963), in a "material and substantial" way. Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1969). The requirement of "material and substantial" interference with a "compelling" governmental interest assures that mere administrative convenience does not override the first amendment, as occurred in *O'Brien. See* Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case,* 1968 SUP. CT. REV. 1, 22 (1968); text accompanying note 36 *supra.*

118. For discussion of these cases, see section I–B *supra.*

119. See the four-part *O'Brien* test and criticism thereof at text accompanying notes 35–38 *supra.*

120. *See* note 90 *supra.*

121. United States v. O'Brien, 391 U.S. 367, 377 (1968).

122. *Id.*

as well to *all* cases of noncommercial flag misuse, including such "ultimate acts" as burning or mutilation.

D. Future Prospects

The Court in *Spence,* however, left unsettled the scope of governmental power to punish unorthodox flag use. By carefully qualifying its holding, the Court scattered many clues that properly drawn or judicially narrowed statutes might, in a proper case, constitutionally be applied to punish acts of flag misuse.[123] It is not unlikely that fairly prompt clarification in this area will be forthcoming—at least two of the cases the Court remanded for reconsideration in light of *Spence* raise as-yet unanswered questions and may return to the Court's docket.[124]

123. The Court implied that in instances of actual breaches of the peace, 94 S. Ct. at 2729, "mindless nihilism," *id.* at 2730, desecration or permanent disfigurement, *id.* at 2732, conduct not likely to be understood, *id.* at 2732, or other instances of *significant* impairment of the flag's physical integrity, *id.* at 2733, its result could be different.

In Smith v. Goguen, 415 U.S. 566 (1974), the Court similarly implied that vagueness defects are curable. The Court referred to the federal flag desecration law, 18 U.S.C. § 700(a) (1970), as an example of a legislative effort of "substantial specificity." 415 U.S. at 582 n.30. Nonvague flag protection statutes are certainly attainable. The most obvious method of assuring clarity would be to enact statutes providing that *only* that flag use conforming with specific guidelines, *e.g.*. the official rules of flag etiquette, 36 U.S.C. § 173 *et seq.* (1970), is legal, and that all other flag use is illegal. While this would solve the vagueness problems, *Spence* teaches that the first amendment would not be satisfied by such schemes.

124. The judgment in People v. Sutherland, 9 Ill. App. 3d 824, 292 N.E.2d 746 (1973), *vacated sub nom.* Sutherland v. Illinois, 94 S. Ct. 3198 (1974), denying first amendment protection for an act of flag burning, was vacated and the case remanded for consideration in light of *Spence* and *Goguen.* State v. Farrell, 209 N.W.2d 103 (Iowa 1973), *vacated sub nom.* Farrell v. Iowa, 94 S. Ct. 3198 (1974), another flag burning case, was likewise vacated and remanded for consideration in light of *Spence.*

Three other flag cases were disposed of by order after the decisions in *Goguen* and *Spence.* In Cahn v. Long Island Vietnam Moratorium Comm., 94 S. Ct. 3197 (1974), *aff'g* 437 F.2d 344 (1st Cir. 1970), the Court affirmed that the first amendment protected the display of a button bearing a likeness of the U.S. flag superimposed by a peace symbol. The declaratory judgment in Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973), *vacated,* 94 S. Ct. 3199 (1974), that Connecticut's flag misuse statute is unconstitutionally vague and overbroad, was vacated and remanded for reconsideration in light of *Spence.* Finally, the appeal in Van Slyke v. State, 489 S.W.2d 590 (Tex. Ct. Crim. App. 1973, *dismissed sub nom.* Van Slyke v. Texas, 94 S. Ct. 3198 (1974), was dismissed for want of a substantial federal question. In that case defendant was convicted of violating TEX. PENAL CODE art. 152 (1953) (repealed 1974), *replaced by* TEX. PENAL CODE § 42.09 (West 1974), prohibiting any act which would "defile, defy . . . or cast contempt upon . . . any flag . . . of the United States," for blowing his nose and simulating masturbation on the flag, Though not mentioned by the Texas court, this incident, too, occurred in the after-

Flag burning, for instance, presents one of those unanswered questions. It impairs the physical integrity of the flag, and significantly so. Were this consideration alone dispositive in a flag burning case, it could confidently be predicted that the Court would uphold flag burning convictions. However, since the Court declined in *Spence* to decide the issue of the legitimacy of a governmental interest in the physical integrity of the flag, it may yet recognize that such an interest can never be unrelated to speech. Since it is precisely the preservation of the *meaning* of the flag which is the raison d'être of flag protection statutes, all noncommercial misuse of the flag[125] should enjoy the same first amendment protection as is enjoyed by verbal speech.[126]

Flag protection statutes narrowly drawn or construed to reach only those instances of flag misuse, besides commercial use, which result in or are inherently likely to result in breaches of the peace, might conceivably be applied[127] to punish flag misuse consistent with first amendment principles developed for verbal speech. [128] However, even assuming the validity of such narrowly drawn statutes, they would serve no useful purpose, merely duplicating the protection against disorder afforded by ordinary breach-of-the-peace statutes.[129]

Absent such narrowing, the present species of flag protection statutes[130] should also be invalid due to their facial overbreadth, even in light of *Broadrick v. Oklahoma*.[131] The Court in *Broadrick* stated:[132]

> [W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as

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math of the Cambodian incursion. Given the similarity of the statutory language to that in *Goguen*, reversal on vagueness grounds might have been possible here, but the issue was not raised by the petitioner. The Supreme Court apparently saw no merit in his claim that the first amendment protected his activity. Given the extreme facts of the case, reluctance to consider the argument is perhaps understandable. Compare People v. Radich, note 51 and accompanying text *supra*.

125. *See* note 115 and accompanying text *supra*.

126. *See* text accompanying notes 113–15 *supra*.

127. *See* Street v. New York, 394 U.S. 576, 592 (1969).

128. *See, e.g.*, Feiner v. New York, 415 U.S. 583 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *Feiner's* vitality has been weakened, however, by Edwards v. South Carolina, 372 U.S. 229 (1963), where the Court refused to allow a breach of the peace conviction simply because a hostile audience was present.

129. *See* text accompanying note 76 *supra*.

130. *See* notes 2 & 53 *supra*.

131. 413 U.S. 601, 615 (1973) (expressive conduct is not entitled to the same degree of protection via facial overbreadth review as is verbal speech).

132. *Id.*

> well, judged in relation to the statute's plainly legitimate sweep, [for the statute to be adjudged facially overbroad and thus invalid].

Modern flag statutes *are* substantially overbroad, prohibiting far more than flag misuse involving breach of the peace. The Court has so recognized: "[I]t is worth noting the nearly limitless sweep of the Washington improper use flag statute."[133]

IV. CONCLUSION

Despite the Court's qualified holding, [134] *Spence* appreciably restricts the power of government to punish unorthodox flag use. Less than significant impairment of the meaning of the flag as a national symbol is protected by the first amendment. This holding may be extended through recognition that preservation of the flag's integrity is an inherently anti-speech interest, one *not* "unrelated to the suppression of free expression."[135]

Were the Court to choose not to extend its holding in *Spence,* it would permit punishment of "offensive" flag misuse, such as flag burning, while allowing relatively innocuous flag misuse, such as Spence's, to go unpunished. This is not permitted by *Street v. New York:* "[E]xpression of ideas may not be prohibited merely because the ideas are themselves offensive. . . ."[136] Because any intentional unorthodox flag use is in some manner an expression of the user's feelings toward the meaning of the flag,[137] the first amendment should be applied to protect equally all flag misuse, regardless of its "offensive" coefficient.

Recognition of this fact would be healthy. Most Americans are disappointed, saddened and offended to see the flag abused. We would prefer that it represent the social and political idealism this country still strives, however haltingly, to achieve. But we have decided as a nation, by the adoption of the first amendment, that the popularity of ideas does not determine the legality of their expression. Because we put our faith in the first amendment as the best means of insuring a

133. Spence v. Washington, 94 S. Ct. 2727, 2732 n.9 (1974).
134. *See* note 123 and accompanying text *supra.*
135. United States v. O'Brien, 391 U.S. 367, 377 (1968).
136. 394 U.S. 576, 592 (1969).
137. *See* notes 100–02 and accompanying text *supra.*

vigorous and robust self-governing society, we should not rely on laws which aim to insure that only one, unvaried idea may be symbolized by the American flag. For however deserving of respect the flag is, if there is anything about this country that is deserving of reverence, it is the array of fundamental freedoms embodied in the first amendment. The flag must not take precedence over those basic liberties which it in part symbolizes.

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